United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 75-4186

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

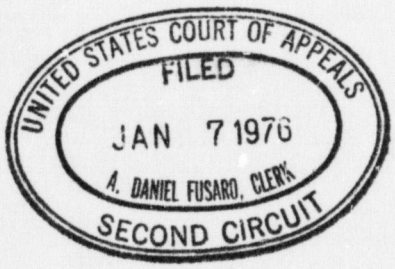
v.

TWO WHEEL CORP., d/b/a HONDA OF MINEOLA,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD



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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Glenn Musano, Robert Siegfried, David Kocivar, Stewart Lilker, Thomas Dodge, Dario Ardito, and Albert Antonson because of their union activities.

2. Whether the Board properly exercised its broad remedial discretion by requiring the Company to bargain with the Union.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., 151, *et seq.*) for enforcement of its order (A. 9-12; 35-37)[1] issued against the Company on June 16, 1975. The Board's decision and order are reported at 218 NLRB No. 87. This Court has jurisdiction over the proceedings pursuant to Section 10(e) of the Act, the unfair labor practices having occurred in Mineola, New York. No jurisdictional issue is presented.

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Glenn Musano, Robert Siegfried, David Kocivar, Steward Lilker, Thomas Dodge, Dario Ardito and Albert Antonson because of their union activities. Additionally, the Board found that a bargaining order was necessary to remedy the unlawful conduct. The facts upon which the Board based its findings are summarized below.

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[1] "A." references are to the printed appendix filed herein. Whenever a semicolon appears in a series of references, the references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

The Company sells and services motorcycles and related parts from its premises on Jericho Turnpike in Mineola, New York. The business is set up in four departments: sales, services, mail order and parts. The four departments are located in the same small retail premises and are separated either by a partition, windows or a door (A. 13; 75-77, 196).

Glenn Musano worked for the Company as a parts counterman (A. 86). During his tenure, management praised his performance on more than one occasion, and shortly before his discharge the Company posted on its bulletin board a customer letter complimenting him (A. 22; 90, 191-192). On August 21, 1974,[2] Musano began soliciting employees to attend a union organizational meeting scheduled after work on Friday, August 23 (A. 13; 47-48, 81, 87-88, 44, 131). Supervisor Ted Port was present when Musano discussed the meeting with a number of employees and Company President Zegarek was nearby on several occasions (A. 13; 87, 97-98, 135). The Company also had ample opportunity to observe Musano's organizational activities on a closed-circuit television system (A. 19, 21; 113-114). On August 23, just prior to the scheduled meeting, Supervisor Harry Wachter told Musano, "I am going to have to let you go." When Musano asked why, Wachter responded, "I think there's a couple of reasons, but I don't know what they are, you will have to ask Mr. Zegarek." Musano went to see Zegarek, and asked him why he had been discharged. Zegarek replied, "Good luck." Musano repeated his question, and Zegarek then said, "Oh, go see Harry." Musano said he had seen Harry, who had said that he should see Zegarek, whereupon Zegarek said, "Well, I don't know. Check with the office." After a few more exchanges of this nature, Musano said a few harsh words and left (A. 14; 88-89, 133).

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[2] All dates are in 1974.

The union meeting was held as scheduled later that night (August 23) and almost all of the attending employees signed authorization cards (A. 14; 48, 183-186). The following Monday, a group of employees and two union representatives approached Zegarek in the shop (A. 14; 41, 50, 110). They told him that the Union represented a majority of the employees and requested recognition (A. 15; 41, 50, 65, 110). Zegarek refused to discuss the matter until after he consulted with other officers of the corporation and with his attorney (A. 15; 50-51, 65-66, 110). When the assembled employees, who were blocking the aisles, refused to disperse, the police were called and Zegarek swore out a criminal trespass complaint (A. 15; 51-52, 66, 110). The employees then left the premises. Later they offered to return to work, but the Company refused the offer, and the employees began picketing the shop (A. 15; 52-53, 67, 110).[3]

Two days later, on August 28, Union representatives met with Zegarek and Company Attorney Isaacson. At the meeting, the Union presented authorization cards and repeated its demand for recognition (A. 15; 44, 54). Isaacson presented the Union representatives with a list of 23 employees, including three members of Zegarek's family and two admitted supervisors (A. 7; 16; 44, 46, 54, 135). Although these five people were stricken from the unit list without dispute, no further agreement could be reached concerning the unit (A. 16; 43). Accordingly, the Union officials announced that they would file an election petition in order to have the matter resolved (A. 31; 43).

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[3] The Board found (A. 5-6) that the refusal to permit them to return was tantamount to a suspension which the Company lawfully imposed because the employees had blocked customer access to its retail sales area during the August 26 meeting – activity not protected by the Act.

At the close of the meeting there was a discussion of seasonal layoffs, which Zegarek stated ordinarily began about September 1 (A. 1 , 122). Zegarek indicated that "in the course of his laying off people in the various departments, they would be so laid off on a seniority basis, if that in fact was possible" (A. 17; 122, 59). The Company stated that, with the exception of Musano, the employees could return to work the following morning, August 29 (A. 16; 55). A representation petition was filed later that day (A. 31; 56). The following morning the employees reported for work (A. 16; 96; 102).

During the next few days, the Company discharged or laid off seven employees. Four of the seven (Dodge, Ardito, Lilker and Kocivar) were told that they were being laid off for lack of work (A. 17, 96-97, 131, 151, 153, 161). One employee (Antonson) was assertedly discharged for coming to work two hours late on August 29 and another employee (Siegfried) was told that he was being discharged because he would not agree to work two nights a week (A. 17; 83, 102-104, 150). The seventh employee (Dyroff) did not appear at the hearing and no finding was made concerning the reason for his discharge.[4] All of these men were in the group of employees that approached Zegarek in the shop to demand union recognition (A. 28; 50, 110). Thereafter, between August 26 and October 12, the Company hired six full-time and four part-time employees to replace the discharged and laid off employees (*infra*, pp. 10-13). Although some of the replacement employees left and were replaced, none of the employees ostensibly laid off for lack of work were recalled (A. 18; 136).

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[4] Dyroff was listed in the complaint as a discriminatee. Although he agreed to appear at the hearing, he failed to do so. The General Counsel presented no evidence concerning his discharge and moved to strike the Section 8(a)(3) references to Dyroff from the complaint. The unopposed motion was granted (A. 17).

II. THE BOARD'S CONCLUSION AND ORDER

On the basis of the foregoing facts, the Board found that the Company discharged employees Musano, Siegfried, Kocivar, Lilker, Dodge, Ardito and Antonson because of their Union organizing efforts, in violation of Section 8(a)(3) and (1) of the Act.[5] The Board's order requires the Company to cease and desist from committing the unfair labor practices found and from "in any other manner" interfering with employees' Section 7 rights. Affirmatively, the order requires the Company to reinstate Musano, Siegfried, Kocivar, Lilker, Dodge and Ardito with backpay to their former jobs or to substantially equivalent positions without prejudice to any employment rights; to make Antonson, a summer employee, whole for any loss of pay suffered between the date of his discharge until the time that his employment would have lawfully ceased in September, 1974; to bargain collectively with the Union upon request; and to post the customary notices.

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[5] The Board, reversing the Administrative Law Judge, dismissed the complaint insofar as it alleged unlawful surveillance of Musano's Union activities (A. 3-4).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY DISCHARGED SEVEN EMPLOYEES BECAUSE OF THEIR UNION ACTIVITIES, IN VIOLATION OF SECTION 8(a)(3) AND (1) OF THE ACT.

The issue before the Court is whether the Board's finding that the discharges were motivated by anti-union reasons is supported by substantial evidence on the whole record. *N.L.R.B. v. Advanced Business Forms Corp.*, 474 F.2d 457, 464 (C.A. 2, 1973); *N.L.R.B. v. Dorn's Transportation Co.*, 405 F.2d 706, 712 (C.A. 2, 1969). In reviewing the Board findings, it is well settled that ascertainment of an employer's motivation is within the province of the Board, whose determination "cannot lightly be overturned." *United Aircraft Corp. v. N.L.R.B.*, 440 F.2d 85 (C.A. 2, 1971); *N.L.R.B. v. Advanced Business Forms Corp.*, 474 F.2d 457, 464 (C.A. 2, 1973). The Court "may not displace the Board's choice between two fairly conflicting views even though the Court would justifiably have made a different choice had the matter been before it *de novo*." *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 405 (1962). Finally, in discharge cases, the Board's finding of intent must often rest upon circumstantial evidence. *N.L.R.B. v. Long Island Airport Limousine Service Corp.*, 468 F.2d 292, 295 (C.A. 2, 1972); *N.L.R.B. v. Dorn's Transportation Co., supra*, 405 F.2d 706, 713 (C.A. 2, 1969). For as the Eighth Circuit explained:

> It would indeed be the unusual case in which the link between the discharge and the union activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the Board is free to draw any reasonable inferences.

N.L.R.B. v. Melrose Processing Co., 351 F.2d 693, 698 (C.A. 8, 1965). As shown below, there is ample evidentiary support for the Board's finding of discriminatory motive in the instant case.

Turning first to Musano, the record shows that he was a satisfactory employee whose work had been praised by his supervisors and by at least one customer as well. Yet only two days after he openly engaged in union activities in the shop and only hours before the first organizational meeting was to occur, Musano was summarily discharged. The Company had never before reprimanded him for misconduct or unsatisfactory performance, much less warned him of possible discharge. Moreover, despite Musano's persistent efforts to find out why he was being terminated, the Company officials responsible for firing him refused to give him a reason. As the Board observed (A. 22):

> The combination of all these circumstances, that is, Musano's leading role in advocating the Union to the employees, his work record as evidenced by the lack of any significant criticism, and the presence of praise, including especial praise to management from a customer, the precipitate nature of the discharge, the "passing the buck" back and forth from Wachter to Zegarek with respect to the reason for the discharge, with neither giving Musano a reason, all add up to a strong affirmative case of a discriminatory discharge in violation of Section 8(a)(3) of the Act.

Indeed, the timing of the Company's action against Musano was "stunningly obvious" (*N.L.R.B. v. Rubin*, 424 F.2d 748, 750 (C.A. 2, 1970), and its "refusal to tell [him] the reason for his discharge was a circumstance which might alone . . . be enough to support an inference that the [discharge] was discriminatory." *N.L.R.B. v. Plant City Steel Corp.*, 331 F. 2d 511, 515 (C.A. 5, 1964).

Zegarek testified that Musano was discharged for incompetence, repeated lateness, absenteeism, refusal to follow instructions, and for accident proneness (A. 23; 146). This contention plainly lacks merit. Initially, none of these alleged shortcomings was ever mentioned to Musano (A. 22; 89-90). Although Zegarek testified that Supervisor Wachter witnessed various acts of misfeasance, Wachter was not called to testify (A. 146). The Company offered no personnel records or time cards to support the allegations of lateness and absenteeism. Moreover, the Company did not even attempt to assign dates and times to the alleged derelictions, nor did it allege that any particular misconduct or dereliction on Musano's part occurred immediately prior to the discharge.

Indeed, undisputed evidence establishes that during Musano's employment with the Company, he had been criticized only once, and even this incident did not in any way reflect adversely upon his competence or qualifications as an employee. On this occasion Musano had been preparing invoices in accordance with the instructions of a previous supervisor and Wachter merely told him to start filling them out in a different way (A. 22; 89-90). In sum, as the Board observed (A. 23), the explanations offered by Zegarek in his testimony "bolster, rather than detract . . . from, the General Counsel's *prima facie* case that Musano's discharge was discriminatorily motivated."[6]

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[6] Zegarek testified that he told Musano he was being fired for incompetence, and that if Musano wanted more details, he should check with the office the following week (A. 14; 147). This account squarely conflicts with the testimony of Musano and employee Dodge. The Board rejected Zegarek's version and found that the circumstances surrounding Musano's discharge were as he and Dodge testified (A. 14). Questions of credibility, of course, are for the Board to resolve. *N.L.R.B. v. Gotham Shoe Mfg. Co., Inc.*, 359 F.2d 684, 688 (C.A. 2, 1966).

Finally, the Company's contention that it was unaware of Musano's union activity is demonstrably without merit. As the record shows, Musano's extensive effort to solicit employees to attend the August 23 organizational meeting were undertaken in the immediate presence of at least one Company supervisor, Ted Port, and President Zegarek himself had several opportunities to observe Musano's union activities. *Supra*, p. 3. On these facts, the Company cannot seriously assert that it was unaware of Musano's support for the Union. Finally, the compelling circumstantial evidence of discrimination in this case – Musano's good work record, the timing of his discharge, the abrupt manner in which it was carried out, and the Company's refusal to tell him why he was being fired – all clearly indicate that the Company knew full well that Musano was trying to organize its employees. See *N.L.R.B. v. Long Island Airport Limousine Service Corp.*, 468 F.2d 292, 295 (C.A. 2, 1972). For all these reasons, the Board properly found that the Company discharged Musano because of his union activities, in violation of Section 8(a)(3) and (1) of the Act.

Only a few days after Musano's discharge, the Company discharged six additional employees. All six were in the group that had confronted Zegarek in the shop and requested union recognition. Most of these employees were told they were being let go for lack of work, although during the period immediately before and following these "layoffs" the Company hired six full-time and four part-time employees to do essentially the same work. Two employees were told they were being discharged for reasons which, as we show *infra*, plainly do not withstand scrutiny. In these circumstances, the Board properly inferred (A. 28), that the same anti-union animus that prompted Musano's discharge also motivated these actions.

Among those ostensibly laid off for lack of work was parts department employee Dario Ardito. The record shows that shortly after Ardito was laid off, an employee identified in the record as Brian was hired, and that he in turn was replaced by another employee named Jim (A. 284). A comparison of the work performed by Ardito and Jim shows that their tasks were similar. Ardito did warranty work, helped customers at the counter, pulled mail orders and parts and received shipments, whereas Jim pulls orders, receives shipments and takes inventory (A. 178-179). Although Zegarek testified that Jim was hired specifically for inventory purposes because the Company's accountants wanted "entirely new people that have no association with us prior to the inventory," the record shows that regular employees in the parts department had worked on inventory in the past and continued to do so after the August layoffs (A. 27; 165, 179). The Board properly ruled that "[a]bsent any corroboration of Zegarek's unsupported statement about his accountants' 'requirements,'" Zegarek's testimony in this respect should not be credited (A. 27).

Service department employee Stewart Lilker was also among those ostensibly laid off for lack of work. Lilker had been hired as an assembler, was promoted to set up work and then promoted again to a regular mechanic's position (A. 112). Shortly after Lilker's layoff, the Company hired three new service department employees – Jay Wilner as a mechanic, and John O'Donnell and Richard Janelli as assemblers (A. 163, 109, 156). Lilker was qualified to do the tasks performed by all these employees. Although Zegarek claimed in his testimony that Jay Wilner was a "full-fledged" mechanic while Lilker was not, the record shows that Lilker had considerable skill and experience as a mechanic and that Zegarek had never before criticized the quality of his work (A. 175-176). Clearly, Zegarek did not perceive Lilker to be less than a "full-fledged" mechanic until the Union demanded recognition, and his attempt to disparage Lilker's

skills is entitled to little if any credence. The Company also asserted that it hired O'Donnell as an assembler, rather than retaining or rehiring Lilker, because the Company had to hire an employee eligible for the V.A. program. The record shows, however, that after the layoffs, advertisements for two positions were placed, both of which sought applicants who were either "V.A. approved or non-V.A. approved" (A. 161). The Company did not explain why the person who filled Lilker's position had to be V.A. approved, while others did not.[7]

The other employees ostensibly laid off for lack of work were salesmen David Kocivar and Thomas Dodge, and Albert Antonson, who did mail order work. It is readily apparent, however, that their services were needed and that they would have been retained but for their union activities. Thus, they were replaced as follows: full-time salesman Mark Trantham was hired and subsequently replaced by Richard Saunders; part-time salesmen Daniel Schultz and Barry Rifle were hired, as were part-time salesman and mail order clerk John Ryan and an unidentified college student who worked as part-time mail order clerk and office worker (A. 156, 157, 162, 168).[8] The Company's contention that the new employees were not replacements because they possessed skills and backgrounds different from those laid off, finds virtually no support in the record. Although Zegarek testified that two of the part-time salesmen would be an asset to the business because they were racing enthusiasts, uncontroverted evidence establishes that the Company sells few racing motorcycles and that these can be sold by employees who do not race themselves (A. 26;

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[7] The Company's contention that Wilner was hired to replace mechanic John Steindel, who quit in September, does not explain why Lilker was not recalled when Steindel quit, nor does it explain why Lilker was laid off at a time when the Company had an obvious need for assemblers.

[8] The three part-time salesmen worked a total of 42-55 hours per week (A. 159, 169-170A).

162-163, 171). Indeed, as the Board observed (A. 26; 171-172), "[a]part from the fact that only 5 percent of the Company's sales were of 'racing' cycles, the fact is that Zegarek never even asked Dodge or Kocivar whether they were racing enthusiasts.' "

To show the necessity for the 1974 layoffs, the Company also placed in evidence a graph prepared by Zegarek which purportedly shows "physical volume" or "sales volume" for the year 1971 (A. 136-137, 197). This exhibit, however, does not support the Company's position. Initially, there is no coordinate on the graph showing the quantity of sales for any given month and therefore no basis exists for computing the percentage decline in sales during 1971. Secondly, although the Company asserts that the number of employees on the payroll is proportional to sales volume at any given time, the record shows that while some layoffs had occurred during slack periods, the Company's practice has been to spread out the available work, under a formula which provides that for each three hours of work during the busy season, employees would work two hours during the slow season (A. 25; 62-63, 86, 96, 101-102, 125, 189-190, 193).[9] Finally, the graph proves nothing with respect to manpower needs in 1974. No such exhibits were adduced for any year other than 1971, and no explanation was offered for not adducing recent sales or payroll data. The Company's failure to produce any current business records only further indicates that the Company is attempting "to disguise an anti-union motive by speaking the language of economic necessity." *N.L.R.B. v. Savoy Laundry, Inc.*, 327 F.2d 370, 372 (C.A. 2, 1964). See *Interstate Circuit v. U.S.*, 306 U.S. 208, 226 (1939); *N.L.R.B. v. A.P.W. Products Co.*, 316 F.2d 899 (C.A. 2, 1963). Of course, in determining whether

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[9] For reasons fully set forth in its decision, the Board properly rejected Zegarek's claim that this policy did not apply to employees with less than 12 months' tenure (A. 25).

the layoffs were discriminatory or part of a normal seasonal reduction in force, "the crucial factor is not whether the business reasons cited by [the Company] were good or bad, but whether they were honestly invoked and were, in fact, the cause for the change." *N.L.R.B. v. Savoy Laundry, Inc., supra,* 327 F.2d 370, 372 (C.A. 2, 1964). The Board properly concluded here that the Company used the seasonal decline as an excuse to get rid of employees who supported the Union.

Before the Board, the Company also argued that at its August 28 meeting with the Union representatives, Zegarek promised that any layoffs would be accomplished by seniority within departments, and therefore Zegarek was precluded from shifting people from one department to another "as he might have preferred to do and as he had done in previous years" (Brief to Board p. 5, A. 27). As the Board observed, however (A. 27):

> [A]side from the fact that [the Company] was not "recognizing" the union, and hence, could scarcely be "bound" by any purported agreement, aside also from the testimony of Attorney Isaacson [A. 122] that Zegarek had said at the meeting only that the employees would be laid on a seniority basis "if it was at all feasibly possible," it is inconceivable that [the Company] could have believed that hiring new employees, as it did, would be preferable to the Union, and that it was precluded from shifting employees around by that "understanding."

The Company also introduced into evidence a memorandum dated August 23, 1974, which Zegarek testified he wrote "to the office." The memo is captioned "End of Season LAYOFF SEPTEMBER," and contains the following: the first names of three employees, the statement "Plus any additional in accordance with business cycle," and the words "Effective

week ending August 30" (RX 9). The memo plainly does not support the Company's contention that the layoffs were economically motivated. At the time the memo was allegedly written, the Company already knew about the Union's organizing campaign and was on the verge of discharging Musano for soliciting on its behalf – indeed, Musano was discriminatorily discharged the very same afternoon. Assuming Zegarek actually drafted the memo that day, the inference that it was prepared for discriminatory purposes would surely be warranted. In any event, as the Administrative Law Judge observed (A. 29):

> the events during the intervening days, including the "suspension" of August 26, and returning the employees to work on August 28, with no mention to any specific employee that his tenure was to be only for a day or two thereafter, tend to cast doubt on Zegarek's testimony, and its supporting memo "to the office" that the determination had been made on August 23. Coupled, as it must be, with the hirings during that period of about as many, considering 2 part-timers as about equal to 1 full-timer, employees as were let go, and with [the Company's] failure to produce any current business records, relying solely on the graph, without any supporting figures even for it, pertaining to its business 3 years previously, and considering also that every employee discharged or laid off had been at the August 26 meeting as union adherents [footnote omitted], I am convinced that all the layoffs and discharges of August 29, 30, and 31 were discriminatorily motivated, as was that of Musano on August 23. . . .

The Company assigned specific reasons apart from the seasonal decline for terminating two of the employees who joined in the Union's demand for recognition. The Board properly found that these asserted grounds were also mere pretexts. While the Company asserted that Robert Siegfried was discharged on August 31, not because he supported the Union, but rather because he would not agree to work two nights a week,

the undisputed evidence establishes that Zegarek knew in July that Siegfried was unwilling to work more than one night a week and had permitted Siegfried to work only the one night; it was not until the employees attempted to bring in a union that Zegarek suddenly concluded that "company needs take precedence" (A. 29; 101, 104).[10] In these circumstances, the Board properly inferred that the real reason the Company discharged Siegfried on August 31 was because he had supported the Union's demand for recognition five days before.

As shown in the Statement (*supra*, p. 5), the Company summarily fired employee Antonson when he reported for work on August 29, the morning after the Company lifted its two-day suspension. Supervisor Port told Antonson that he was being discharged for reporting two hours late that morning, but the Board properly found that this was not the real reason since prior to the organizing campaign, lateness had been treated as a minor offense, and Antonson and others had been late before without any penalty attaching (A. 29; 83, 134). Indeed, Zegarek testified at the hearing that Antonson had been terminated for a wholly different reason, namely, because he was a summer employee and school was starting. Of course, the Board was not required to accept this explanation either, for it squarely conflicted with Port's statements the morning of the discharge. In any event, since Zegarek knew that school was not scheduled to reopen until sometime in September, it is unlikely, to say the least, that he would have terminated Antonson without any warning in mid-week with three working days remaining in August. In short, neither

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[10] Evening work was encouraged, but was not mandatory, at least for all employees. For example, Lilker testified without contradiction that he was told when hired that "evening hours were optional," and the record shows that Rupple, who was hired in June, is still working for the Company, even though he does not work nights (A. 112, 108-109). Zegarek did not testify that *all* employees had to work nights, nor did he explain why the Company's needs suddenly dictated that Siegfried would have to work nights during the slower season when he had not been required to do so during the height of the summer season.

of the explanations offered by Zegarek bears scrutiny, and it readily appears that Antonson was terminated for the same reason as his fellow employees, namely, because he joined in the demand for recognition.

For all these reasons, the Board properly found that the Company discharged employees Musano, Antonson, Lilker, Siegfried, Kocivar, Ardito and Dodge because of their union activities, in violation of Section 8(a) (3) and (1) of the Act.

II. THE BOARD'S BARGAINING ORDER IS AN APPROPRIATE REMEDY

A. The Union's majority status

The Company does not dispute the Board's finding that a unit of its parts, service, sales and mail order employees is appropriate for bargaining (A. 32 n. 20). The Company contends, however, that the General Counsel failed to establish that the Union represented a majority of the unit employees. As we now show, this contention lacks merit.

At the August 28 meeting, Zegarek presented a list of 23 individuals employed by the Company. This list was not placed in evidence, however, and Zegarek contended before the Board that Musano's name was not on the list, a contention which the Board accepted *arguendo.* Of these 24 potentially eligible individuals, it is undisputed that six do not belong in the unit: three of these six are members of Zegarek's immediate family, two are supervisors, and the Board sustained the Company's contention that Antonson did not belong in the unit because he was only a temporary summer employee. Of the 18 remaining employees, the Board properly excluded two – William (Skip) Dowling and an employee identified only as Richie – because they were temporary workers whose employment, like that of Antonson, was to cease at the beginning

of the school year (A. 8; 117, 142, 154-56). The Board, therefore, concluded that the bargaining unit consisted of 16 employees.

Of these 16, nine executed clear and unambiguous cards authorizing the Union to represent them in collective bargaining. The parties stipulated to the authenticity of the signatures on these cards (A. 115, 183-188). There is no contention that any of these signatures were improperly obtained. Although two of the nine cards were signed shortly after the Union's demand for recognition on August 28 (one employee signed on August 28, the other signed on September 3), these cards were properly counted toward the Union's majority. The law is settled that for purposes of a remedial bargaining order, it need only be shown that "at one point the Union had a majority." *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969). As the Board observed in this case (A. 8 n. 7), "where, as here, there is no allegation or finding of a separate violation of Section 8(a)(5), the continuing nature of the demand and the specific date on which the Union achieved majority status are irrelevant." Cf. *N.L.R.B. v. International Metal Specialties, Inc.*, 433 F.2d 870-872 (C.A. 2, 1970), cert. denied, 402 U.S. 907.

Finally, the Company contended that Kocivar's card should not have been counted because he was a statutory supervisor within the meaning of Section 2(11) of the Act.[11] The Board properly found, however, that he was not a supervisor. Kocivar was hired as a regular salesman, at the Company's standard starting wage of $2 an hour, and thereafter was treated like other nonsupervisory employee (A. 61). He punched the time clock, spent the vast majority of his workday taking care of customers

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[11] This section defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

in the showroom, and was required to perform such menial tasks as cleaning motorcycles and display cases (A. 64, 69). His wage rate was increased in typically small increments, and when discharged, he was earning only $3 an hour, the same rate as that paid Lilker (A. 61-62, 112A; see also, 95, 100-101, 108, 129). Although Kocivar had been given a list of menial chores, such as seeing to it that the wastebaskets and ashtrays were emptied, and was told to assign jobs from the list when a salesman had nothing to do, this limited authority was clearly routine and did not involve the use of independent judgment (A. 72-73, 170). See *Precision Fabricators v. N.L.R.B.*, 204 F.2d 567, 568-569 (C.A. 2, 1953); *N.L.R.B. v. Cousins Associates, Inc.*, 283 F.2d 242, 243-244 (C.A. 2, 1960). The routine nature of this authority is illustrated by the following incident: On one occasion when Kocivar made an assignment from the list, an employee became disgruntled and complained to the sales manager that he "already had enough bosses." According to the uncontradicted testimony of the employee involved, the sales manager replied that "Dave [Kocivar] wasn't a manager, that he was just to look over the shop and make sure these things get done. . . ." (A. 176-177). While Zegarek claimed at the hearing (A. 140-142) that Kocivar's responsibilities were somewhat more substantial, his testimony in this respect is inconsistent with his own prior actions. For when the Company and the Union went over the list of employees on August 28 in order to determine who was in the bargaining unit, neither Zegarek nor Company counsel Isaacson, who was also present, made any claim that Kocivar was a supervisor, although on this same occasion they did object to two other employees and the parties struck the names of Harry Wachter and Ted Port from the list because of their supervisory status (A. 54-55, 57-58). Zegarek's belated attempt to exclude Kocivar from statutory coverage is clearly without merit.

The Company also points to a handwritten entry on Kocivar's application for employment, in the space provided for "Employment Desired – Position," which reads "Sales Mgt." (A. 198). The Company concedes, however, that Kocivar did not make this entry, and Zegarek was unable to identify the person who did, except to say that it was someone in the Company's office (A. 170-171, 138). Kocivar, on the other hand, credibly testified that he never knew the entry had been made, that he had no conversation about a management position when he was hired, and that the first time he was told he was being considered for such a position was on August 30, 1974, the day before he was terminated (A. 171).

For these reasons, the Board properly found (A. 30) that Kocivar was an employee within the meaning of the Act, that his authorization card should be counted, and that the Union held valid authorizations from 9 of the 16 unit employees.

B. The Board did not abuse its discretion by ordering the Company to bargain with the Union

In *N.L.R.B. v. Gissel Packing Co., supra*, 395 U.S. 575, the Supreme Court sustained the Board's remedial authority to issue bargaining orders in cases such as this one, where unfair labor practices have been committed "that interfere with the election process and tend to preclude the holding of a fair election." 395 U.S. at 594. The Court indicated that a bargaining order would be appropriate: (1) where the employer's unfair labor practices are so "pervasive" and "coercive" that it is the only effective means of remedying those unfair labor practices; or (2) where the unfair labor practices, though less substantial, are nonetheless such that, in view of their tendency to undermine the Union's majority and the likelihood of their recurrence in the future, "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair

election (or a fair rerun) by the use of traditional remedies, though present, is slight, and that employee sentiment, once expressed through cards, would, on balance, be better protected by a bargaining order." 395 U.S. at 614. Moreover, as this Court has observed, "the determination of whether unfair labor practices are of such a nature as to warrant the issuance of a bargaining order is for the Board and not the Courts." *M.P.C. Restaurant Corp. v. N.L.R.B.*, 481 F.2d 75, 79 (C.A. 2, 1973). Accord: *N.L.R.B. v. Hendel Mfg. Co.*, 483 F.2d 350 (C.A. 2, 1973); *N.L.R.B. v. Int'l Metal Specialties, Inc.*, *supra*, 433 F.2d at 872 ("Appellant's attack on the use of a bargaining order must fail . . . in light of the Supreme Court's decision in *[Gissel]*, entrusting to the Board almost total discretion to determine when a bargaining order is appropriate").

A bargaining order is unquestionably appropriate in this case, for as the Board observed, the Company "not only discharged Musano, the leading union adherent, at the outset of the Union's organizational campaign, but it proceeded to discharge for unlawful reasons 6 more of the 16 unit employees within one week of their participation in the Union's initial demand for recognition. [Footnote omitted.]" In these circumstances, the Board properly found the Company's conduct "so egregious as to preclude the holding of a fair election and to require the issuance of a bargaining order under the guidelines set forth by the Supreme Court in *Gissel, supra*. [Footnote omitted.]" (A. 9).

CONCLUSION

For the foregoing reasons, we respectfully request that the Board's order be enforced.

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January, 1976

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 75-2680
	)	
LABORERS UNION LOCAL NO. 938, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,	)	
	)	
Resondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed reply brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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Dated at Washington, D. C.
this 5th day of January, 1975.